Office-Supreme Court, U.S.
FILED
AUG 21 1968
JOHN F. DAVIS, CLERK

In the Supreme Court

of the

United States

OCTOBER TERM, 1968

No. 350

AGNES L. HAINES, as surviving spouse and personal representative of DONALD J. HAINES, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief of Respondent Southern Pacific Company In Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

RALPH W. BILBY
RICHARD M. BILBY
Ninth Floor, Valley National Bldg.
Tucson, Arizona 85701
Attorneys for Respondent

BOYLE, BILBY, THOMPSON & SHOENHAIR
Of Counsel

SUBJECT INDEX

	Page
Judgment Sought to be Reviewed	1
Statement of Facts	2
Reasons for Denying the Writ	6
Did Evidence of Petitioner's Negligence Present a Jury Question	9
Conclusion	11
Appendices	12

CITATIONS

CASES

	Pages
Basham v. Pennsylvania R. Co., 372 U.S. 699, 10 L.Ed.2d 80 (1963)	10
Caplinger v. Northern Pacific Terminal, 418 P.2d 34 (1966 Supreme Court of Ore.)	6
Daulton v. Southern Pacific Co., 237 F.2d 710 (9 Cir. 1956)	6
Ganotis v. New York Central Railway Co., 342 F.2d 767 (6 Cir. 1965)	6
Herdman v. Pennsylvania R. Co., 352 U.S. 518, 1 L.Ed.2d 508 (1957)	10
Jesionowski v. Boston & Maine Railroad, 329 U.S. 452, 91 L.Ed. 416 (1947)	10
Miller v. New York Central Railway Co., 239 F.2d 10 (7 Cir. 1956)	8
Missouri-Kansas-Texas R.R. v. Shelton, 383 S.W.2d 842 (Tex.Civ.App. 1964)	6
Mumma v. Reading Company, 247 F.Supp., 252 (D.C.E.D.Penn. 1965)	6
Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5 Cir. 1965)	10
Rogers v. Southern Pacific Co., 172 C.A.2d 493, 342 P.2d 258 (1959)	7
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L.Ed 610 (1943)	10
Tracy v. Terminal R. Ass'n of St. Louis, 170 F.2d 635 (8 Cir. 1948)	7
Webb v. Illinois C.R. Co., 352 U.S. 512, 1 L.Ed.2d 508 (1957)	9

Constitutional Provisions, Statutes and Rules Involved

	Pages
United States Constitution, Amendment VII	10
45 U.S.C. §53	8

In the Supreme Court

of the

United States

OCTOBER TERM, 1968

No. 350

AGNES L. HAINES, as surviving spouse and personal representative of DONALD J. HAINES, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief of Respondent Southern Pacific Company In Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

JUDGMENT SOUGHT TO BE REVIEWED

This case was tried to a jury which returned a verdict in favor of the Defendant Southern Pacific Company on the 11th day of February, 1966. Thereafter, on the 26th day of May, 1966, the Petitioner's Motion for New Trial was denied. Petitioner thereupon appealed to the Arizona Court of Appeals, Division Two, which, by written opinion entered on January 17, 1968, affirmed the jury's verdict. [7 Ariz. App. 65, 436 P.2d 159] The Court of Appeals

subsequently denied the Petitioner's Petition for Re-Hearing on March 21, 1968. Petitioner then filed a Petition for Review with the Supreme Court of Arizona which was denied on April 30, 1968, by that Court.

STATEMENT OF FACTS

The Petitioner (Plaintiff) has omitted from her statement of the case most all of the facts upon which the jury based its verdict for the Respondent (Defendant) Southern Pacific Company and misstated those not omitted. This necessitates our statement.

The Plaintiff's decedent's death was caused by slack action resulting from a derailment of the train in which he was riding. The derailment was caused by a broken rail.

The two major issues which were tried to the jury were: (a) What caused the rail to break; and (b) Whether either the Defendant or the Plaintiff was guilty of negligence.

It was Plaintiff's contention that the rail broke because of improper inspection by the Defendant which permitted a bolt to become loose in the joint area thereby causing the cracks in the rail which led to the breaking of the rail and the derailment. It was Defendant's contention that the rail was regularly inspected and that the breaking was not the result of a failure to inspect or any negligence on the part of the Defendant. Each of the parties submitted evidence in support of their respective theories. Defendant also contended that the death of Plaintiff's decedent was caused solely by his own negligence.

The Plaintiff employed an expert, Fred H. Cady, who came to Tucson to inspect the rail. He testified twice, once at a previous trial of this cause and again at the

present trial. [Ab. 29,40] At both of these trials, he testified that the derailment was caused by a broken rail resulting from a loose bolt in the joint area of the broken rail. It was his theory that the bolt had been loose for some substantial period of time prior to the derailment. [Tr. 195] The Defendant's expert contested this theory and testified that in his opinion the bolt became loose as a result of the accident and was not the cause thereof. [Tr. 365]

Both experts based their testimony upon inspections of the broken rail and certain photographs taken at the scene of the accident. [Tr. 184-86, 331-32]

The Defendant's expert testified that normal wear and tear on the rail caused the bolt in question to exert pressure on the web of the rail thereby causing cracks to develop. [Tr. 365] These cracks worked their way through to the top of the rail resulting in the broken rail which in turn caused the derailment. [Tr. 250,353]

The Defendant produced its inspection records of this rail and introduced testimony concerning rail inspection practices in the area of the derailment. [Tr. 136-38, 237-40]

This uncontradicted evidence showed that from a metallurgical standpoint, the Ultrasonic and Detector Cars should inspect the rail once or twice a year. [Tr. 334] In this case such semi-annual inspections were carried out prior to the derailment. The latest inspections prior to the derailment of November 14, 1964, were on September 9, 1964 (Ultrasonic Car) and July 12, 1964 (Detector Car). These inspections did not discover any defects in the rail in question. [Tr. 161, Pl. Exh. 16]

On the issue of the Plaintiff's decedent's negligence, the evidence showed that prior to the derailment, the train in which Mr. Haines was working as conductor, had

been proceeding in an easterly direction toward Bowie, Arizona. [Tr. 9] At the same time, a local freight train was approaching Bowie from the north on another set of tracks, not a part of the main line. [Tr. 5,6] Mr. Haines, while seated in the caboose on his train, overheard a radio-telephone conversation between the conductor and engineer on the local freight train. [Tr. 22,32] He voluntarily got out of his seat by the south bay window and broke into their conversation. [Tr. 22] At the time of Mr. Haines' interruption, the conductor on the local freight train was asking his engineer whether the north leg of the Y at Bowie was clear. [Tr. 37]

While Mr. Haines was talking on the phone, Mr. Hannah, the swing brakeman, was seated at the north bay window; Mr. Upshaw, the flagman, was seated in the rear of the caboose; and the conductor's chair on the north side of the caboose immediately behind the north bay window was not occupied. [Tr. 30,33,44] As Defendant's Exhibit F shows the radio-telephone being used by Mr. Haines was located on the partition between the conductor's desk and the seat in the north bay window occupied by Mr. Upshaw.

To answer any questions concerning the north leg of the Y, Mr. Haines would have to look out the north side of the caboose. [Tr. 10,38] This he could do while still holding the phone by either standing in the aisle and looking out the north bay window or by sitting down in the conductor's chair and looking out the conductor's window. [Tr. 38,53; Defendant Exh.E, Plaintiff Exh.8] The radio-telephone being used by Mr. Haines had a ten foot extension cord to enable the conductor to use it while seated at his desk. [Tr. 21,53] Mr. Haines stood in the aisle of the caboose for approximately two to three minutes prior to the derailment. [Tr. 23,31]

There was in effect at the time of the derailment Rule 2044 of the safety rules of the Southern Pacific Company, for the protection of employees riding in moving equipment such as was Mr. Haines, which rule provided:

> "At all times when riding moving equipment employees must be prepared for sudden or unexpected starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foot hold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performances of duties." [Defendant Exh.C]

The evidence showed that slack action can and does occur at all speeds. [Tr. 101] The Assistant Superintendent testified:

> "One is likely to have slack action any time and the people that are riding on the train are supposed to be protecting themselves and expecting slack action at any time." [Tr. 102]

Because of Mr. Haines' failure to either sit down in the conductor's chair or properly brace himself while standing in the aisle, the slack action resulting from the derailment threw him to the end of the caboose. [Tr. 34,45] Neither Mr. Hannah nor Mr. Upshaw, who were seated in the same caboose at the time of the derailment, were thrown about or injured, nor was there any damage done to the interior of the caboose. [Tr. 40,53,88]

In addition to Plaintiff's Instruction No. 7 defining contributory negligence, the Court also gave Defendant's Instruction No. 12 setting forth the method by which the jury was to approach this case. Plaintiff's only objection to Defendant's Requested Instructions No. 6, 8, 9, 10, 11 and 12 was that the evidence did not warrant an instruction on contributory negligence. [Tr. 479]

Furthermore, until the Plaintiff's counsel filed their Opening Brief in the Court of Appeals, they had never objected to the specific language of these Instructions nor did they raise any question about these Instructions in their Motion for a New Trial.

REASONS FOR DENYING THE WRIT

As was true of all the contentions raised by the Petitioner in the Court of Appeals in the State of Arizona, the present Petition for Writ of Certiorari deals only with problems related to the issue of contributory negligence.[1]

In light of the law and the Court's instructions to the jury on the matter of negligence and causation to which Plaintiff entered no objection, the matters raised by Petitioner are completely irrelevant to the jury verdict and its affirmation on appeal.

Respondent directs the Court's attention to Defendant's Instruction No. 12, which correctly instructed the jury as to its function in deciding this case. Plaintiff admitted that the instruction was legally correct and entered no objection to it other than it contained a reference to contributory negligence as to which Plaintiff contended there was not sufficient evidence.[2]

---

[1] While the Texas Court of Civil Appeal in *Missouri-Kansas-Texas R.R. v. Shelton*, 383 S.W.2d 842, (Tex.Civ.App. 1964) Cert. denied, 382 U.S. 845 (1965), by way of dictum, has held in favor of a double standard of causation, the overwhelming authority in all other Courts is to the contrary. *Ganotis v. New York Central Railway Co.*, 342 F.2d 767 (6 Cir. 1965); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5 Cir. 1965); *Mumma v. Reading Company*, 247 F.Supp. 252 (D.C.E.D. Penn. 1965); *Caplinger v. Northern Pacific Terminal*, 418 P.2d 34 (1966 Supreme Court of Ore.); and *Daulton v. Southern Pacific Co.*, 237 F.2d 710 (9 Cir. 1956).

[2] "Mr. Miller: Will you harken to my argument that although it is *legally correct* that it is just confusing to a jury because of its intricacies." [Tr. 412] (emphasis supplied)

Pursuant to this instruction, the jury determined by its verdict, on the basis of conflicting evidence, that there was no negligence on the part of the Defendant which contributed in any degree, no matter how small, to the death of Plaintiff's decedent. In light of that finding any alleged error on the issue of contributory negligence was harmless. *Rogers v. Southern Pacific Co.*, 172 C.A.2d 493, 342 P.2d 258, 261 (1957); and *Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635 (8 Cir. 1948).

The language of the Court in *Rogers v. Southern Pacific Co., supra*, deals specifically with this matter when it held:

> "In order to find its verdict for defendant under these instructions, the jury must have found that defendant was guilty of no negligence which contributed as a proximate cause to decedent's death. *Under such circumstances any error in the instructions or the admission of evidence relating solely to the decedent's contributory negligence can not have been prejudicial to appellant.*" (emphasis supplied)

The validity of the Respondent's position with regard to this matter was recognized by the Petitioner's counsel in their Reply Brief filed in the Court of Appeals, State of Arizona: (p.2)

> "Defendant contends that a defense verdict in an FELA case could only be the result of a jury finding of no negligence on the part of the defendant, since contributory negligence only diminishes the award and does not bar recovery. *Defendant's logic would be unassailable if the jury were properly instructed that contributory negligence only diminishes the award.* However, the jury was not so instructed. . . ." (emphasis supplied)[3]

[3] Of course, we contend that even if there were error in the contributory negligence instructions (which we deny) that could have no bearing on the jury verdict.

It is inconceivable to Respondent that counsel for Plaintiff would claim that the jury was not properly instructed in light of their own Requested Instruction No. 7 and Defendant Southern Pacific Company's Instruction No. 12.[4]

45 U.S.C. §53, which is set out on pages 26-27 of the Petitioner's Appendix G provides that:

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: . . ."

Plaintiff's own Requested Instruction No. 7 provided as follows:

> "Contributory negligence, if any, on the part of the decedent does not bar a recovery by the plaintiff against the defendant Southern Pacific Company, but the total amount of damages to which the plaintiff otherwise would be entitled shall be reduced by you in proportion to the amount of negligence attributable to the decedent."

The most cursory reading of 45 U.S.C. §53 and Plaintiff's Requested Instruction No. 7 indicates the correctness of the instruction under the law and establishes beyond question that this jury was properly instructed that contributory negligence only diminishes the award. Therefore, to quote Plaintiff's counsel: ". . . Defendant's logic (is) unassailable."

---

[4] Counsel's failure to raise any of the present contentions with respect to the language of the various contributory negligence instructions is compounded by his failure in the trial court to offer any instructions on his own concerning the effect of contributory negligence on the amount of damages, if any, to be awarded Plaintiff. Such a failure constitutes a waiver of any objection to the Defendant's instructions on the point. *Miller v. New York Central Railway Co.*, 239 F.2d 10 (7 Cir. 1956).

In the present posture of this case there is no important question of Federal law properly before the Court. If the jury had returned a meager verdict indicating that it had found both parties guilty of negligence which in some manner contributed to the Plaintiff's decedent's death, then the question of a double or single standard might conceivably present such a question of interpretation of Federal law. However, this jury did not so find and its verdict conclusively establishes that the defendant Railroad was free from any negligence which contributed in whole or in part to the death of Plaintiff's decedent. This being the case, Petitioner has failed to present the Court with a record upon which to make any decision concerning the standard of causation applicable to contributory negligence in an FELA case.

DID EVIDENCE OF PETITIONER'S NEGLIGENCE PRESENT A JURY QUESTION?

> "In Passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given . . . ." *Webb v. Illinois C.R. Co.*, 352 U.S. 512, 1 L.Ed.2d 503, 505 (1957).

The jury was instructed, without any objection by Petitioner's counsel, that it was permitted:

> ". . . to draw from the facts which you find have been proved such inferences as seem justified in light of your experience. . . ." [Tr. 450]

The most justifiable inference to be drawn from the proven facts was that had Petitioner's decedent seated himself in the available seats (which would still allow him to look out the windows to the north), or properly braced himself while standing in the aisle, he would not have been thrown to his death by the slack action of the train.

The rule of an Appellate Court in reviewing the sufficiency of the evidence was established by this Court in *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 10 L.Ed. 2d 80, 82 (1963) as follows:

> ". . . but where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or discharge whatever facts are inconsistent with its conclusions, and the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is not reasonable."

Here, the jury had such a basis and under Amendment VII to the Constitution of the United States, the trial court was required to submit this issue to the jury.

Plaintiff's reliance upon *Jesionowski v. Boston & Maine Railroad*, 329 U.S. 452, 91 L.Ed. 416 (1947) and *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L.Ed. 610 (1943) is not justified under the facts of this case. Unlike *Jesionowski* the death in this case resulted from slack action against which Plaintiff's decedent could, and should, have protected himself. *Herdman v. Pennsylvania R. Co.*, 352 U.S. 518, 1 L.Ed.2d 508 (1957). Furthermore, the uncontradicted evidence in this case was that slack action is not an unusual or extraordinary occurrence. [Tr. 102]

Petitioner's allegations concerning Rule 2044 are without any foundation in the record. The evidence was uncontradicted as to the duty to be on the alert for slack action on a moving train. Furthermore, Petitioner neither proved nor made any offer to prove that Rule 2044 was customarily violated. To the contrary, the only evidence on this point was that anyone using the phone in such a manner as to violate this rule was promptly told to sit down. [Tr. 109]

The negligence of the Defendant Southern Pacific Company that was alleged and sought to be proved by Plaintiff was its care and inspection of the broken rail. This question was thoroughly covered by both Plaintiff and Defendant with expert testimony and otherwise and the jury was instructed on res ipsa loquitur. The issue thus joined was resolved by the jury in the Defendant's favor.

CONCLUSION

The jury in this case was presented with evidence supporting two conflicting theories as to why this accident occurred and was given admittedly proper instructions as to the Defendant Railroad's duties, including an instruction on res ipsa loquitur. Based upon this evidence and these instructions, it then returned a verdict holding that the Defendant Southern Pacific Company was not guilty of any negligence which in any degree, no matter how small, caused the death of Petitioner's decedent.

The jury having found that there was no negligence on the part of the Defendant, this is not a case in which the questions concerning contributory negligence posed by Petitioner could legitimately be answered or decided. Had the jury returned a verdict in some amount for Petitioner, then such an issue might conceivably be presented. However, such is not the case and Respondent therefore requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted this 20th day of August, 1968.

BOYLE, BILBY, THOMPSON & SHOENHAIR
By RALPH W. BILBY
RICHARD M. BILBY
Ninth Floor, Valley National Bldg.
Tucson, Arizona 85701
Attorneys for Respondent

APPENDIX

Appendix A

DEFENDANT'S REQUESTED INSTRUCTION No. 3

A continuous duty exists on the part of an employer, such as the defendant Southern Pacific Company in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in the work.

To put the matter in another way, the amount of caution required of a railroad company, in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers known to exist or that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary an employee may assume that the employer has exercised ordinary care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption.

DEFENDANT'S REQUESTED INSTRUCTION No. 4

A death is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the injury or death. So if you find from the evidence that any negligence on the part of the defendant Southern Pacific Company contributed in any way or manner toward the death of Donald Haines you may find that death was proximately caused by defendant's act or omission.

DEFENDANT'S REQUESTED INSTRUCTION No. 12

The issues to be determined by you in this case are these:

First: Was the defendant employer negligent?

If your answer to that question is "No," you will return a verdict for that defendant; but if your answer is "Yes," you have a second issue to determine, namely:

Did that negligence contribute in any way or manner toward the death of the decedent?

If your answer to that question is "No," plaintiff is not entitled to recover, but if your answer is "Yes," then you must determine a third question:

Was the decedent negligent?

If you find that the decedent was not, after having found in the plaintiff's favor on the other two issues, you then must fix the amount of plaintiff's damages and return a verdict in his favor.

If you find that the decedent was negligent, you then must determine a fourth issue, namely:

Did that negligence contribute as a proximate cause of decedent's death?

If you should find that it did not, and you previously have found that the defendant employer was guilty of negligence which contributed to decedent's death, you then must fix the amount of plaintiff's damages and return a verdict in his favor.

But if your answer to the fourth question is "Yes," thus finding that the decedent was guilty of contributory negligence, you then must follow the law and procedure for arriving at damages and diminishing the same in proportion to the amount of negligence attributable to the decedent.

This you will do in accordance with my instructions on such matters.

COURT'S INSTRUCTION ON INFERENCES

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bare statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such inferences as seem justified in the light of your experience. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved.